U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
OCT 21 2004
CLERK, U.S. DISTRICT COURT
By Deputy

B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANNA SALINAS, on her behalf and on behalf of those similarly situated,	§	
	§	
Plaintiff,	§	Civil Action No. 3:04-CV-1861-B
	§	
v.	§	
	§	
O'REILLY AUTOMOTIVE, INC.,	§	
	§	
Defendant.	§	

O'REILLY AUTOMOTIVE INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE AFFIRMATIVE DEFENSES

Defendant O'Reilly Automotive Inc. ("O'Reilly") opposes Plaintiff Anna Salinas' ("Plaintiff") Motion to Strike Affirmative Defenses.

I. INTRODUCTION

This Court should deny Plaintiff's Motion to Strike Affirmative Defenses ("Motion to Strike") because Plaintiff has failed the rigorous standard for striking defenses under Rule 12(f) of the Federal Rules of Civil Procedure[1] and because striking O'Reilly's defenses would be premature in light of the remarkable paucity of factual allegations contained in Plaintiff's Original Collective Action Complaint.

---

[1] Rule 12(f) of the Federal Rules of Civil Procedure states:

> **(f) Motion to Strike**. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

FED. R. CIV. P. 12(f).

Plaintiff cites no controlling authority holding that the defenses or general defensive principles[2] of estoppel, waiver, unclean hands or laches are insufficient as a matter of law as applied to claims brought under the Fair Labor Standards Act ("FLSA"). More specifically, Plaintiff has not shown -- and it is her burden to do so -- that these principles can never succeed against any claim under the FLSA in any factual circumstance. Nor has Plaintiff articulated the specific factual circumstances of her own claims that, she contends, might defeat the pleaded principles in this case as a matter of law. Nor has Plaintiff shown that she is prejudiced in any way by the inclusion of these defenses and general defensive principles in O'Reilly's Answer to Plaintiff's Original Collective Action Complaint ("O'Reilly's Answer").

On the contrary, O'Reilly is obliged under Rule 8 to declare in its pleading those defenses that it believes may potentially play a role in the case. O'Reilly has done this.

II. Argument and Authorities

A. Plaintiff Has Failed the Rigorous Standard for Striking Pleadings Under Rule 12(f).

Motions to strike under Federal Rule of Civil Procedure 12(f)[3] are disfavored and are infrequently granted. *See United States v. Cushman & Wakefield, Inc.*, 275 F. Supp. 2d 763, 767 (N.D. Tex. 2002) (citing *Augustus v. Bd. of Pub. Instruction*, 306 F.2d 862, 868 (5th Cir. 1962)). This is because striking a portion of a pleading is a drastic remedy and because motions to strike often are sought by the movant simply as a dilatory tactic. *See F.D.I.C. v. Niblo*, 821 F. Supp. 441, 449 (N.D. Tex. 1993). Under Rule 12(f), a court can strike a defense only if it is insufficient, redundant, immaterial, impertinent or scandalous. *See* FED. R. CIV. P. 12(f).

---

[2] Rules 8(c) and (e), Fed. R. Civ. P., provide for a notice pleading requirement. In an abundance of caution and collegiality, O'Reilly's counsel has identified those equitable, defensive principles which may tend to impact the defense of FLSA overtime wage claims. The principles asserted are typical and, no doubt, are familiar to this Court. They are to be construed "to do substantial justice." FED. R. CIV. P. 8(f).

[3] For text of Rule *see* fn.1, *supra*.

An affirmative defense is legally insufficient if, in light of sound precedent, it cannot succeed under any factual circumstance. *See F.D.I.C. v. Cheng*, 832 F. Supp. 181, 185 (N.D. Tex. 1993). Furthermore, unless the matter of which the movant complains bears no possible relation to the controversy or may cause the objecting party prejudice, such motions should be denied. *See OKC Corp. v. Williams*, 461 F. Supp. 540, 550 (N.D. Tex. 1978). A court must also deny a motion to strike if there is any question of law or fact. *See Niblo*, 821 F. Supp. at 449. Here, Plaintiff's Motion to Strike fails to mention, much less satisfy, this rigorous standard for striking defenses.

Plaintiff must show that, in light of her pleadings, the asserted defense can succeed under no factual scenario. Not only does Plaintiff offer no Fifth Circuit precedent that the pleaded defenses or defensive principles about which she complains can *never* apply in FLSA actions but, given the complete dearth of factual content in her own complaint, it is impossible even to guess at the factual basis for Plaintiff's claims -- let alone unequivocally hold that O'Reilly's affirmative defenses will succeed under no factual circumstance whatsoever. Without facts, that judgment simply cannot be made.

Second, in nearly every argument set forth in her Motion to Strike, Plaintiff also neglects to acknowledge case law that recognizes the relevance and applicability of each of these defenses or defensive principles to claims asserted under the FLSA in other cases.

Finally, before the Court may strike an affirmative defense from the pleadings, Plaintiff must establish that its inclusion will result in "prejudice" to her. *See Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York*, 278 F. Supp. 2d 313, 325 (N.D.N.Y. 2003). "[W]hen there is no showing of prejudicial harm to the moving party . . . the court may properly and . . . should, defer action on the motion [to strike] and leave the sufficiency of the allegations for determination on the merits." *See Augustus v. Bd. of Pub. Instruction*, 306 F.2d 862, 868 (5th Cir. 1962) (footnote omitted). Plaintiff has not even attempted to show, let alone satisfy Rule 12(f)'s standard, that she is prejudiced in any way by O'Reilly's assertion of these defenses and general defensive principles. On the contrary, O'Reilly's inclusion of these defenses and defense principles comports with its own obligations under Rule 8 and is helpful in that notice of potential defensive matters is provided.

B. Plaintiff's Motion to Strike Is Premature and Unnecessary.

Plaintiff's sues under the FLSA for overtime wages that were allegedly earned but not paid for hours that Plaintiff was "required to work 'off the clock.'" (Pl.'s Orig. Col. Act. Compl. ¶ 11.) Apart from the single, conclusory allegation of "off the clock" work, the Complaint lacks any supporting detail whatsoever. It lacks any description of "off the clock" overtime Plaintiff claims to have performed; what individuals, if any, are culpable for the alleged wrongful acts; how often Plaintiff allegedly worked in excess of 40 hours per workweek; and why she submitted and accepted overtime pay requests for some overtime work, but not for the "off the clock" work she is seeking in this lawsuit.

Frankly, Plaintiffs allegations are so vague that it is difficult even to prepare the initial disclosures contemplated under Rule 26(a)(1) of the Federal Rules of Civil Procedure. Other than the name of the basic statute under which it is sued, O'Reilly knows little else of the facts, if any, giving rise to Plaintiff's claims. As such, O'Reilly has articulated in good faith its various defenses to Plaintiff's claims. In light of a party's limited opportunities to amend its pleadings under the Federal Rules of Civil Procedure and in light of the fact that Plaintiff has asserted a collective action suit in which potentially thousands of plaintiffs could "opt in," each with varying experiences to which different defenses could apply, O'Reilly had little choice but plead as it did.

Additionally, Plaintiff misconstrues the nature of O'Reilly's defenses. O'Reilly has not asserted that all of the defenses named in Plaintiff's Motion to Strike Affirmative Defenses may necessarily apply as true affirmative defenses. Without factual disclosure by Plaintiff of the scope of her claims, O'Reilly just doesn't know yet. Several of O'Reilly's defenses, such as estoppel and unclean hands, also are general defensive principles applied by courts to prevent unjust or inequitable results under the FLSA, even if not formally pleaded. And O'Reilly has noted this to Plaintiff's counsel. (App. 004 (09/28/04 Letter).)

A determination (at the proper time) whether these defenses ultimately are implicated as true affirmative defenses, or merely as general defensive principles, or perhaps not at all, will turn on the specific details of Plaintiff's specific grievances. *Id.* At this time, given the paucity of Plaintiff's factual pleadings, and lacking case law that estoppel, unclean hands, waiver or laches have no application to any claim under the FLSA under any factual circumstance, Plaintiff's Motion to Strike is, at best, premature.

C. Plaintiff's Contention that the Affirmative Defenses and Defensive Principles in O'Reilly's Original Answer Are Legally Insufficient Misstates the Law.

The irony here is that Plaintiff has failed (i) to plead even the most basic facts necessary to support an allegation "off the clock" work, giving rise to O'Reilly's broad statement of pretrial defenses, (ii) to account for Rule 12(f)'s stringent standards for striking an opponent's defenses, or (iii) to give substance to her demand to strike pleading with facts that she in any way avers will support her arguments that O'Reilly's defenses cannot succeed in the context of her specific claims. In truth, after all of this, Plaintiff's motion boils down to Plaintiff's citation to a smattering of cases from an assortment of jurisdictions wherein those various courts (usually after an appropriate period of time and not in the Rule 12(f) context) considered whether certain defenses applied to specific facts peculiar to those cases -- but which facts, as far as O'Reilly can tell, are not facts that Plaintiff in any way contends apply to this case. For example, Plaintiff argues that estoppel must be stricken from O'Reilly's pleadings because "[f]ederal courts have held that acceptance of an improper wage does not estop an FLSA claim." (Pl.'s Mot. to Strike at 3.) However, Plaintiff's analysis of this singular fact scenario ("acceptance of an improper wage"), which Plaintiff did not plead and which is not otherwise averred to be pertinent to Plaintiff's "off-the-clock" allegations,[4] frankly is little more than a self-serving and extremely narrow characterization of O'Reilly's estoppel defense in an attempt to bring the defense within the scope of the particular case Plaintiff has found that has the outcome Plaintiff would like here. It is, of course, easy to defeat a factual scenario that no one contends is pertinent.

As noted above, this case is not ripe for any ruling on the application of any affirmative defense or defensive principle in the absence of clearly defined facts, particularly without binding legal precedent or any showing of prejudice. O'Reilly discussed with Plaintiff's counsel the general applicability of the defenses pleaded, (*see* App. 004 (09/28/04 Letter)), but Plaintiff nonetheless argues here that estoppel, unclean hands, waiver and laches must be stricken as a matter of law. This is incorrect.

1. Estoppel

Contrary to the singular case cited by Plaintiff, federal courts have long held that a "[p]laintiff in daily reporting over his own signature the amount of time employed by him daily and permitting his employer to act thereon, without any knowledge of the falsity of such reports, is estopped from now claiming that such daily reports were incorrect." *Mortenson v. W. Light &*

---

4 Plaintiff's initial disclosures do not mention "acceptance of an improper wage." (*See* App. 005-009 (Pl.'s Initial Disclosures).) In fact, Plaintiff's initial disclosures, particularly the section where a party is required to discuss claims and defenses, are no more helpful than her pleadings in setting forth the factual basis for her claim of "off the clock" work. Thus, O'Reilly remains puzzled that Plaintiff would seize upon this particular fact scenario as grounds for a court order striking O'Reilly's defenses. The long and short of it is that Plaintiff's disclosures provide no guidance to the Court or O'Reilly concerning the applicability of the defenses that O'Reilly has pleaded. (*Id.*)

Tel. Co., 42 F. Supp. 319, 322 (S.D. Iowa 1941); *see also Brumbelow v. Quality Mills, Inc.*, 462 F.2d 1324, 1326-27 (5th Cir. 1972); *Wirtz v. Harrigill*, 214 F. Supp. 813, 815 (S.D. Miss. 1963), *aff'd*, 328 F.2d 963 (5th Cir. 1964); *Walling v. Woodruff*, 49 F. Supp. 52 (M.D. Ga. 1942). The FLSA is not designed or intended to be used "as a sword on which to impale an unsuspecting employer who is engaged in a business and honestly exercises a reasonable effort in good faith to comply with all the required provisions of such act." *Wirtz*, 214 F. Supp. at 815. Clearly, the general principle of estoppel is relevant and applicable to a claim for overtime compensation under the FLSA, is not insufficient as a matter of law, and does not prejudice Plaintiff. It would be clear error to strike such from O'Reilly's Answer at this juncture. Moreover, a motion to strike *any* affirmative defense is premature in the context of Plaintiff's skimpy and conclusory factual allegations of "off-the-clock" work.

2. Unclean Hands.

Similarly, Plaintiff cannot show that the general defensive principle of unclean hands is insufficient as a matter of law as applied to every claim brought under the FLSA. For example, in *George Lawley & Son Corp. v. South*,[5] the First Circuit explained that in some circumstances, the general defensive principle of unclean hands, or a claimant's own deceit or misconduct, can bar a plaintiff's recovery of overtime wages under the FLSA. 140 F.2d 439 (1st Cir. 1944). While not a viable defense in that case, the court noted that such misconduct by a plaintiff could in some circumstances bar a plaintiff's recovery of monetary damages under the FLSA. Specifically, when a plaintiff engages in deceitful misconduct, a court should "construe the Act in the light of the strong equities here disclosed in favor of the defendant and not permit

[5] Plaintiff's counsel cited this case in a letter dated 09/22/04 to O'Reilly's attorneys. (*See* App. 002 (09/22/04 Letter).) After reviewing the case, O'Reilly's attorney pointed out to Plaintiff's counsel that it supports an unclean hands defense, apparently causing Plaintiff to delete the contradictory case citation before filing her Motion to Strike.

the Act to be invoked to work an unfair, harsh and burdensome result which does not in any way advance its purpose to relieve unemployment among, and improve the ages of, the workers in the lower income groups." *Id.* at 443. Thus, the general defensive principle of "unclean hands," or a claimant's own deceit or misconduct, plainly is relevant and applicable to prevent an unjust application of the FLSA under some facts.

The cases Plaintiff cites in support of her argument to strike O'Reilly's "unclean hands" defense do not involve claims under the FLSA and, given the paucity of factual information in Salinas' complaint, cannot be applied to the controversy at hand.

3. Waiver.

Nor does Plaintiff cite precedent that a waiver cannot succeed against a claim under the FLSA in any factual circumstance. The Fifth Circuit recognizes that a plaintiff claiming overtime compensation under the FLSA may waive her right to sue by signing a waiver statement acknowledging that she has agreed to accept a tendered payment in connection with her claim for overtime compensation and by taking a check for the amount due as determined by the Department of Labor. *See Sneed v. Sneed's Shipbuilding, Inc.*, 545 F.2d 537, 539-40 (5th Cir. 1977). The statute plainly provides that a defense of waiver can succeed against a claim brought under the FLSA in some factual circumstances.[6] Although Salinas herself may not have signed such a waiver provision, she has alleged a collective action in which potentially thousands of other plaintiffs could "opt in." Without some better-defined statement of her own claims,

---

[6] Section 216 of the Fair Labor Standards Act, under which Plaintiff brings this suit, provides in part:

> The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full ***constitute a waiver by such employee*** of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.

29 U.S.C. § 216(c) (2004) (emphasis added).

Plaintiff cannot argue that none of the potential plaintiffs who might "opt in" in the future has not entered into, or will not enter into, such an agreement. Moreover, even a waiver unsupervised by the Department of Labor may have terms of interest to the court in the resolution of the yet unspecified claims, and Plaintiff has no standing to contest defenses uniquely applicable to others who may opt in to this matter.

4. Laches.

Finally, Plaintiff has failed to show that the principles underlying the doctrine of laches can never be applied to a claim brought under the FLSA under any factual circumstance. Plaintiff cites no binding precedent holding that a laches defense is insufficient as a matter of law to a claim brought under the FLSA. Plaintiff was to work specific, scheduled hours, and she was to report, and did report and get paid for, a substantial number of overtime hours. A plaintiff cannot wait years after unspecified alleged occurrences to complain about alleged unpaid overtime which she endorsed and accepted at the time as an accurate accounting of hours worked and which was uniquely within her control to accept or reject. This is particularly so if the absence of contemporary reporting now creates an evidentiary gap between Plaintiff's claimed overtime hours worked and overtime she actually recorded, approved and was paid for.

III. CONCLUSION

In sum, Plaintiff's Motion to Strike lacks any clear, coherent argument intended to propel this litigation forward. The motion is remarkable for the absence of even a minimal effort by Plaintiff to articulate or apply Rule 12(f)'s requirements. Instead, it appears to be a costly, unnecessary and disruptive tactic, having no appreciable purpose except to burden and harass O'Reilly. This Court's, O'Reilly's and the Plaintiff's resources could have been better spent.

For the foregoing reasons, O'Reilly respectfully requests that the Court deny Plaintiff's Motion to Strike Affirmative Defenses.

Respectfully submitted,

BAKER BOTTS, L.L.P.

By: ______________________________

Teresa S. Valderrama
State Bar No. 20422500
Kathryn S. Vaughn
State Bar No. 00785144
One Shell Plaza
910 Louisiana
Houston, Texas 77002
Telephone: (713) 229-1234
Facsimile: (713) 229-1522

LUTTRELL & WILLIAMS, P.C.

By: ______________________________

John M. Williams
State Bar No. 21554200
L. Don Luttrell
State Bar No. 12708630
3000 Weslayan, Suite 350
Houston, Texas 77027
Telephone: (713) 877-1077
Facsimile: (713) 877-1089

ATTORNEYS FOR DEFENDANT
O'REILLY AUTOMOTIVE, INC.

OF COUNSEL:

Eric Senske
State Bar No. 18027100
BAKER BOTTS, L.L.P.
2001 Ross Avenue
Dallas, TX 75201
(214) 753.6500 (Telephone)
(214) 753.6503 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent to the following counsel of record this the 20th day of October 2004:

Brady Edwards
EDWARDS & GEORGE, L.L.P.
1000 Louisiana, Suite 1300
Houston, Texas 77002

Derek Braziel
EDWARDS & GEORGE, L.L.P.
208 N. Market Street, Suite 400
Dallas, Texas 75202

Richard J. (Rex) Burch
BRUCKNER BURCH PLLC
5847 San Felipe, Suite 3900
Houston, Texas 77057

Teresa S. Valderrama